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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*

SOUTHWESTERN BELL TELEPHONE, L.P., FKA SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, Et Al.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR CONSUMER FEDERATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Federal Communications Commission, *Memorandum Opinion and Order In the Matter of Application by Ameritech Michigan to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137 (re. Aug. 19, 1997)..... 15-16

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) (Second Advanced Services Report) 4

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Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) ..... *passim*

MISCELLANEOUS

American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/Telecom%20Fact%20Sheet_1-2003.pdf&VARACTION=GO. 16, 18

The Benton Foundation, *Bringing a Nation Online: The Importance of Federal Leadership* (July 2002), at http://www.benton.org/publibrary/nationonline/bringing_a_nation.pdf. 6, 7

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David Armstrong and Dennis K. Berman, *Fighting City Hall,* Wall St. J., Aug. 17, 2001, at A1 ..... 6, 11

Diane Lachel, statement on Tri-City Broadband website at http://www.tricitybroadband.com/failures.htm..... 17, 18

Ed Gubbins, *Why You Can Get the Best Deal on High-Speed Access in Glasgow, Kentucky,* Telephony Online (Dec. 9, 2002), at http://telephonyonline.com/ar/telecom_why_best_deal/..... 18

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Munis Take Broadband Success Stories to Capitol Hill, Public Power Weekly, No. 40 (Oct. 6, 2003), at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/news/success.pdf&VARACTION=GO. 16

National League of Cities and National Association of Telecommunications Officers and Advisors, *Local Government Officials Guide to Telecommunications and Rights of Way* (2002) 11

Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network* (Feb. 2002) at http://www.pff.org/publications/pop9.7guppyclick.pdf 17

Paul Sommers and Deena Heg, *Spreading the Wealth: Building a Tech Economy in Small and Medium-Sized Regions*, The Brookings Institution Center on Urban and Metropolitan Policy (Oct. 2003), at http://www.brookings.edu/es/urban/publications/200310_Sommers.pdf 17-18

Richard Hellman, Government Competition in the Electric Utility Industry: A Theoretical and Empirical Case Study (1972) 13

Richard Steinberg, *Nonprofit Organizations and the Market, in* The Nonprofit Sector: A Research Handbook (Walter W. Powell ed., 1987) 14

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William G. Shepherd, *Regulation, Entry and Public Enterprise, in* Regulation in Further Perspective: The Little Engine That Might 17 (William G. Shepherd and Thomas G. Gies eds., 1974) 13

William G. Shepherd, Economic Performance Under Public Ownership (1965) 13

Utility Lines, Tacoma Power (March/April 2001) 17

INTEREST OF CONSUMER FEDERATION OF AMERICA AS AMICUS CURIAE

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.[1] CFA appears regularly before federal, state, and municipal, legislative, judicial, and administrative bodies, including the Federal Communications Commission ("FCC") and local franchising bodies. CFA's members include consumers interested in promoting effective and viable competition in the provision of telecommunications services.[2]

Vigorous competition among telecommunications service providers, including municipally-owned entities, benefits consumers by yielding lower prices, better service, and increased innovation. Consumers should not be asked to wait for private providers to saturate densely populated and more profitable markets before turning to less profitable areas.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that the preemption authority contained in Section 253(a) of the

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[1] Additional information concerning CFA is available online at the organization's website, the address of which is www.consumerfed.org. (URL accessed October 21, 2003.)

[2] Pursuant to Rule 37.3, consents of counsel for the Petitioners and Respondents have been obtained and filed with the clerk of the Court. Pursuant to Rule 37.6, no counsel for any other party has authored this brief, in whole or in part, and no person or entity, other than the amicus or its counsel, has made monetary contributions to the preparation or submission of this brief.

Telecommunications Act of 1996 ("the 1996 Act")[3] extends to state-imposed bans on the provision by municipal governments of telecommunications services. A central purpose of the 1996 Act was the promotion of meaningful competition, not the protection of competitors.

Bans on municipal entry protect neither consumers nor taxpayers, and inhibit the formation of much-needed competition. In many small and rural communities across the country (and even in many major markets), consumers continue to wait for benefits that such competition could bring. Instead of meaningful competition, consumers are faced with escalating prices charged by and inadequate service received from incumbent providers. In addition, the same incumbent providers resist competition by implementing monopolistic practices that make it difficult for fledgling competitors to succeed. State-imposed prohibitions on municipal entry into telecommunications may prevent residents of small and rural communities from having access to the advanced telecommunications services that are essential in order to be able to participate fully in today's society.

Incumbents' campaigns against municipal competition rely on commentaries by organizations sponsored by the very incumbent providers who would gain through prohibition of municipal competition.[4] In short, the purpose of the 1996 Act was to create competition in the provision of telecommunications services. Competition is not created by excluding an entire class of competitors. Moreover, there are

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[3] 47 U.S.C. § 253 (2000).

[4] For example, the Progress and Freedom Foundation, whose commentary is cited in the briefs of Sprint and of the United States Telecom Association *et al.*, lists BellSouth, Comcast, SBC Communications, Sprint, the Telecommunications Industry Association, United States Telecom Association, and Verizon Communications as contributors. See http://www.pff.org/supporters.htm. (URL accessed October 21, 2003.)

measures far less restrictive than outright prohibition that can be implemented to address legitimate concerns, if any, about municipal provision of telecommunications services.

ARGUMENT

I. THE GOAL OF THE TELECOMMUNICATIONS ACT OF 1996 IS TO PROMOTE COMPETITION, NOT TO PROTECT COMPETITORS

As this Court has made clear, anti-trust laws "were enacted for the protection of *competition*, not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).[5] This Court's decisions concerning the relationship of anti-trust laws to competition and competitors are also applicable to the pro-competitive goals of the 1996 Act. The 1996 Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, 110 Stat. 56 (1996). Thus, the 1996 Act was neither intended to favor any single class of competitors, nor to permit prohibitions of one class of potential competitors from participating in the market.

Similarly, Section 706 of the 1996 Act directs the FCC and the states to encourage the deployment of advanced telecommunications capability on a reasonable and timely

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[5] See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115 (1986). ("The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust laws, since it resulted only from continued competition."); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 n.14 (1984).

basis.[6] In both its *Second* and *Third Advanced Services Reports*, the FCC cited municipal provision of telecommunications service as evidence of how viable competition encourages deployment of advanced services.[7] The FCC specifically identified Muscatine, Iowa as an example of a locality that had been successful in bringing high-speed advanced services to a rural community. *Second Report*, at ¶ 113. The FCC credited the state of Iowa's legal environment, which encourages municipal entry, for contributing to the high level of advanced services deployment. *Id.* at ¶ 140. Indeed, even private providers acknowledge the important role that publicly-owned utilities can play by serving as a source of potential competition, and thereby encouraging rapid deployment of advanced telecommunications services.[8]

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[6] See 47 U.S.C. § 157 nt. Section 706(b) directs the FCC to report regularly on the availability of advanced telecommunications capability through initiation of a notice of inquiry. Section 706(c) defines advanced telecommunication capacity as "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data graphics, and video telecommunications using any technology."

[7] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, FCC 00-290 (rel. Aug. 21, 2000) (*Second Advanced Services Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, FCC 02-33 (rel. Feb. 6, 2002) (*Third Advanced Services Report*).

[8] See AT&T Corp. Comments filed in CC Docket No. 98-146 (Sept. 24, 2001) at 8.

The FCC -- which erroneously found that Section 253 did not preempt state bans on municipal entry -- recognized unanimously that municipal provision of telecommunications services furthers the pro-competitive purposes of the 1996 Act. *In re Missouri Municipal League, et al.*, 16 F.C.C.R. 1157, ¶ 10 (2001). The FCC likewise determined that absolute prohibitions on municipal provision of telecommunications services hinders, rather than enhances, the deployment of advanced services to small or rural communities. *Id.* The FCC had reached the same conclusion four years earlier, stating that

> "[W]e encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in PURA95. Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services."

In re The Public Utility Commission of Texas, et al., 13 F.C.C.R. 3460, ¶ 190 (1997).

The brief of petitioner Southwestern Bell Telephone and the amici briefs of Sprint and the United States Telecom Association, Verizon, BellSouth, and CenturyTel ("USTA Brief") advance arguments that are aimed at promoting their positions as dominant competitors, contending that municipal competition imposes burdens they should not be required to bear. Specifically, Sprint complains (Brief at 24) that municipal entry inevitably requires private providers to participate in costly state legislative and regulatory proceedings. The claim that incumbents believe they need to protect themselves in legislative and regulatory proceedings involving potential competitors hardly advances Sprint's cause. The 1996 Act was not enacted to perpetuate monopolies or to ease the burdens upon monopolist service providers. Further, Sprint's decision to participate in those arenas is its business choice. The deployment of advanced

services through competition and lower prices should not be compromised merely because the existence of such competition may prove inconvenient to incumbent providers.

Similarly, Sprint proves nothing in claiming that bans on municipal telecommunications service providers are justified because private sector companies have "invested in local communities." (Sprint Brief at 1) If Sprint has in fact constructed a robust local network and is prepared to offer residents a full range of advanced services at competitive prices, then it should have nothing to fear from either public or privately-owned competitors.

The reality is that the picture is very different from the one painted by Sprint. It is private industries' inadequate investment and poor service in many communities that has created a gap that municipal providers are willing to fill in order to ensure that their citizens are not left behind.[9] In July 2002, the Benton Foundation published a study in which it found that

> Significant divides still exist between ... rural and urban households. For people in these communities, the enormous social, civic, educational and economic opportunities offered by rapid advances in information technology remain out of reach.

Bringing a Nation Online: The Importance of Federal Leadership at 3.[10]

Large gaps in Internet use remain between high and low-income consumers. The Benton Foundation study reported

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[9] See David Armstrong and Dennis K. Berman, *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1 for discussion of Tacoma, Washington's Click! Network and Glasgow, Kentucky's fiber-optic system.

[10] The Benton Foundation study is available at http://www.benton.org/publibrary/nationonline/bringing_a_nation.pdf. (URL accessed October 21, 2003.)

that cost was a primary factor behind many consumers not having Internet access available in their homes. *Id.* at 7. With prices for broadband service escalating, the cost barrier for advanced telecommunications services will further limit access for low-income consumers. The cost barrier also is a factor limiting some businesses' ability to subscribe to advanced services. *Third Advanced Services Report*, FCC 02-33, ¶ 97.

A traditional role of government has been to provide essential services to citizens when competitive markets fail to do so.[11] The reasons underlying the emergence of municipal telecommunications providers are strikingly similar to those that gave rise to publicly-owned electric utilities at the turn of the century. Publicly-owned utilities first emerged in small towns that were unable to attract private providers. In the late nineteenth century, electricity was seen as more of a novelty than a necessity, but soon it came to be viewed as an essential commodity directly linked to a community's economic survival. Many rural communities were left with the choice of forming a government-owned electric utility or being left in the dark.[12] Similarly, high-speed Internet access, while viewed as a novelty only a few years ago, now has come to be viewed as an essential element necessary for communities to create economic, employment, and educational opportunities.

The *Wall Street Journal* reported that "rural home owners" and "low-spending phone users" may not benefit from lower prices that competition can bring, citing the then-president of operations at SBC Communications' acknowledgement that, "[t]here is a large percentage of telephone customers that

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[11] Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 Rutgers Computer and Tech. L. J. 1, 24 (1999).

[12] *Id.*

nobody wants to serve ... It is unrealistic to think that every customer is attractive to the marketplace."[13] In its *Third Advanced Services Report*, the FCC found that most areas outside of major metropolitan areas do not have multiple advanced telecommunication service providers.[14] In areas where competition exists, business and residential consumers have realized the benefits of lower costs for such services that their counterparts in single provider areas have not.[15] In such an environment, it makes little sense to prohibit municipalities from providing a competitive yardstick against which to measure service furnished by incumbents and from providing citizens access to essential telecommunications services that would otherwise be unaffordable or unavailable.

II. THERE ARE LESS RESTRICTIVE MEASURES SHORT OF OUTRIGHT PROHIBITION THAT STATES CAN EMPLOY TO PROTECT CONSUMERS AND TAXPAYERS

The FCC has considered the various and oft-repeated objections raised by incumbent providers to municipal entry. The Commission has found that, to the extent such concerns are reasonable, they can be addressed through means short of outright prohibitions. As the FCC has explained:

> We continue to recognize ... that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to

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[13] Stephanie N. Mehta, *In Phones, the Number is Four*, Wall St. J., Mar. 8, 1999, at B1.

[14] *Third Advanced Services Report* at ¶ 97.

[15] *Id.*

> compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry.

In re Missouri Municipal League, et al., 16 F.C.C.R. 1157, ¶ 11 (2001) (footnote omitted).

There is ample protection for both consumers and competitors in the language of Section 253. While Section 253(a) preempts a state's ability to prohibit municipal entry, the three parts of Section 253 do not exist in isolation. Section 253 preserves the authority of states to safeguard consumers and promote competition on a competitively neutral basis. Section 253(b) preserves a state's regulatory authority to "impose, on a competitively neutral basis ... requirements necessary to ... protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

The argument that municipal entry disadvantages private competitors is equally misplaced. Local governments do not regulate telecommunications providers, contrary to the assertions of amici Sprint and USTA *et al.* (Sprint Brief at 20-21; USTA Brief at 17-19) That is the province of state public utility commissions and the FCC. Section 253(c) correctly recognizes that local governments have authority over the management of public rights-of-way, but requires that such management must be on a competitively neutral and non-discriminatory basis. There is no basis for incumbent competitors to assume that local management of public rights-of-way will automatically or necessarily favor municipal providers. Indeed, a review of the cases cited in the USTA Brief (at 18-20) demonstrates that incumbent providers have been able to pursue successful litigation when and if they are able to show overreaching by local

governments.[16] CFA notes that none of the cases cited in the USTA Brief addressing municipal regulation of public rights-of-way involved municipalities that were providing telecommunications services as a competitive provider.[17] Contrary to the assertion (Sprint Brief at 20-21) that rights-

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[16] See, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001, *cert. denied, City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001).

[17] Not only is USTA *et al.'s* reliance on those cases misplaced for purposes of this proceeding, but their brief also misconstrues case law addressing the permissible level of rights-of-way usage fees. The discussion in *City of Auburn v. Qwest* relied upon by USTA *et al.* (Brief at 18) regarding rights-of-way fees stands in marked contrast to the more measured decisions of other courts. In *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-625 (6th Cir. 2000), the Sixth Circuit upheld the city's imposition of a revenue-based fee of 4% of the provider's gross revenues as "just and reasonable" pursuant to Section 253(c). In analyzing the Ninth Circuit's decision in *City of Auburn*, the Second Circuit in *TCG New York v. City of White Plains* observed that, "the Ninth Circuit declared in passing that 'non-cost-based fees' are 'objectionable,' but only after concluding that other, non-severable aspects of the local ordinances ... required preemption. Thus, the Ninth Circuit's statement about 'non-cost-based fees' could be described as dicta." *TCG New York v. City of White Plains*, 305 F.3d 67, 78 (2nd Cir. 2002) citing and quoting *City of Auburn*, 260 F.3d at 1179 and n. 19. Moreover, *City of Auburn v. Qwest* follows a line of several earlier district court decisions, several of which have been vacated. See *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded*, 212 F.3d 863 (4th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999), *vacated and remanded*, 243 F.3d 928 (5th Cir. 2001); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997) *vacated and remanded*, 235 F.3d 241 (5th Cir. 2000); *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001); and *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, 24 (E.D. Pa. Dec. 20, 1999).

of-way fees amount to forced-subsidization of municipal competitors, such fees are essential for the preservation of a finite public resource. Rights-of-way fees help ensure the safety and viability of public streets to the benefit of service providers and taxpayers alike.[18]

Incumbent providers also argue without empirical evidence that a municipal provider has an unfair advantage over its privately-owned competitor because a municipal provider pays no taxes and benefits from cross-subsidization. (Sprint Brief at 17-25; USTA Brief at 21-22; See also Southwestern Bell Telephone Brief at 18) The "support" offered by Sprint and USTA *et al.* for these claims consists of advocacy "studies" and commentaries conducted on behalf of industry-sponsored organizations.[19] Specifically, in place of

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[18] See National League of Cities and National Association of Telecommunications Officers and Advisors, *Local Government Officials Guide to Telecommunications and Rights of Way* (2002).

[19] See footnote 4 *infra*. Jeffery Eisenach, who authored *Does Government Belong in the Telecommunications Business?* (cited in USTA Brief at 16 and Sprint Brief at 17), is the president of the Progress & Freedom Foundation. *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network* is listed as a Progress and Freedom Foundation publication on the organization's website and is available at http://www.pff.org/publications/pop9.7guppyclick.pdf. (URL accessed October 21, 2003.) Further, *Incentives for Anticompetitive Behavior by Public Enterprises* (cited in Sprint Brief at 21) was written on behalf of the AEI-Brookings Institute for Regulatory Studies. The AEI-Brookings Joint Center is sponsored, in part, by Verizon. Ronald Rizzuto, co-author of *Costs, Benefits, and Long-Term Sustainability of Municipal Cable Television Overbuilds* (cited in Sprint Brief at 22), conducts industry-funded studies of municipal cable systems. See David Armstrong and Dennis K. Berman, *Fighting City Hall*, Wall St. J., Aug. 17, 2001, at A1. Mr. Rizzuto was also a consultant for a number of incumbent cable providers. See http://www.coloradonano.org/ronrizzuto.htm. (URL accessed October 21, 2003.)

quantifiable evidence, Sprint cryptically refers to "hidden subsidies" that are "impossible to quantify" as justification for the drastic remedy of preventing municipal governments from providing a competitive alternative to incumbent providers. (Sprint Brief at 24-25, citing Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, at 15 (Jan. 2001), at http://www.pff.org/POP8.1GovtTelecom011001LOGO.pdf (URL accessed October 21, 2003.)

Publicly-owned telecommunications service providers do not pay state or federal income taxes because they are non-profit entities that do not earn taxable income. However, such entities do make other payments to state and local governments in lieu of the taxes paid by privately-owned entities. Moreover, Sprint and USTA *et al.* ignore that investor-owned telecommunications providers benefit from substantial tax incentives that dramatically lower their costs.[20] The two major tax incentives available to investor-owned providers are accelerated depreciation and investment tax credits. In 2000, this resulted in a reduction of approximately 4 billion tax dollars to the U.S. Treasury. Additionally, these tax benefits lowered the cost of doing business for investor-owned providers by $5.7 billion.[21]

Both Sprint (Brief at 18) and USTA *et al.* (Brief at 20) also complain about the ability of local governments to issue tax-free or reduced-interest loans to raise capital. This claimed advantage is a result of Congressionally-enacted public policy, just as are the tax benefits accorded to investor-owned companies. There is no sound reason to apply Section 253 in

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[20] See MSB Energy Associates, *Major Tax Breaks for Investor-Owned Telephone Companies in the Year 2000* (Jan. 2000), at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/newsroom/releases/msbreport.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

[21] *Id.* at v.

a manner that would disturb such policies, or to allow tax policy to defeat the requirement that no state statute or regulation may prevent competition. Any unwarranted imbalance created by tax benefits or rights-of-way fees can be resolved through legislation, rather than implementing an outright ban on municipal entry.

The sweeping claims that municipally-owned providers of services are inherently less efficient and chronically dependent on tax subsidies is folklore. Municipal electric utilities have been examined in approximately a dozen studies. Kwoka's comprehensive review of these studies finds no support for the tax subsidy claim advanced by both Sprint and USTA *et al.*[22] Findings on costs and prices are mixed, but the most frequent finding is that municipal providers pass lower costs through to the public in the form of lower prices.[23]

One of the primary reasons that the folklore does not withstand close scrutiny is that it fails to consider that economic organizations can be motivated to achieve efficiency for reasons other than profit. Thus, municipally-owned utilities that are providing basic necessary services

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[22] John Kwoka, Power Structure: Ownership, Integration, and Competition in the U.S. Electricity Industry (1996); John Kwoka, *Governance Alternatives and Pricing in the U.S. Electric Power Industry*, 18 J.L., Econ. & Org. 278 (2002). Earlier literature reaching similar conclusions includes Jack P. Grove, *The Municipal Utility and the Liberal Economic Ethic*, 30 Case W. Res. L. Rev. 267 (1980); William G. Shepherd, *Regulation, Entry and Public Enterprise, in* Regulation in Further Perspective: The Little Engine That Might 17 (William G. Shepherd and Thomas G. Gies eds., 1974); William G. Shepherd, Economic Performance Under Public Ownership (1965); Richard Hellman, Government Competition in the Electric Utility Industry: A Theoretical and Empirical Case Study (1972).

[23] Kwoka, 1996.

can be just as strongly motivated to achieve efficiency in order to achieve output maximization.[24]

This is especially important in an environment where private, for-profit entities have resisted providing access to their local telephone networks, as evidenced by a remarkably long seven year struggle to achieve market opening under section 271 of the 1996 Act. Incumbent telecommunications providers' resistance to providing non-discriminatory access to advanced telecommunications services is readily apparent in efforts to pass legislation which would excuse them from the obligation of nondiscriminatory access.[25]

In an environment where facilities-based competitors are few and far between, publicly-owned entities are especially attractive to consumers because they serve as a competitor that is committed to serving the public. The claim that publicly-owned systems have an unfair advantage overlooks the immense advantage that more than a century as the incumbent telephone monopoly has conferred on local telephone companies. These were amply described in the decision of the FCC to reject the first section 271 application. The decision set forth in detail the competitive advantages the local telephone companies have in entering the long distance market compared to other companies entering the local market. These advantages include a history of legal barriers, economic and operational barriers, the fully deployed, ubiquitous network of the incumbents which

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[24] Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980); Richard Steinberg, *Nonprofit Organizations and the Market, in* The Nonprofit Sector: A Research Handbook (Walter W. Powell ed., 1987); Burton A. Weisbrod, *Institutional Forms and Organizational Behavior, in* Private Actions and the Public Good (Walter W. Powell and Elizabeth Clements eds., 1998).

[25] See, *e.g.* Internet Freedom and Broadband Deployment Act of 2001, H.R. 1542, 107th Cong. (2001) (commonly referred to as "Tauzin-Dingell").

lowers their incremental cost of entering other markets, the need for interconnection, and strong brand recognition.[26]

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[26] Federal Communications Commission, *Memorandum Opinion and Order In the Matter of Application by Ameritech Michigan to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, at ¶ ¶ 11,12, 15, 17 (rel. Aug. 19, 1997).

> For many years the provision of local exchange service was even more effectively cordoned off from competition than the long distance market. Regulators viewed local telecommunications markets as natural monopolies, and local telephone companies, the BOCs [Bell Operating Companies] and other incumbent local exchange carriers (LECs), often held exclusive franchises to serve their territories. Moreover, even where competitors legally could enter local telecommunications markets, economic and operational barriers to entry effectively precluded such forays to any substantial degree...
>
> An incumbent LEC's ubiquitous network, financed over the years by the returns on investment under rate of return regulation, enables an incumbent LEC to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own network components. Additionally ... Congress recognized that ... no competitor could provide a viable, broad-based local telecommunications service without interconnecting with the incumbent LEC...
> Indeed, given the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors.
>
> Significantly, however, the 1996 act seeks not merely to enhance competition in the long distance market but also to introduce competition to local telecommunications markets. ... Unlike BOC entry into long distance, however, the competing carriers'

Finally, Sprint's claim that municipal telecommunication projects often fail is ideological rhetoric, not an accurate portrayal of municipal involvement. (Sprint Brief at 22). Public and private entities measure success in different ways. Additionally, like their private counterparts, it is not essential that public projects generate positive returns in initial stages. Rather, other factors such as economic development and educational opportunities are valuable commodities for municipal governments.[27] Additionally, with community-owned telecommunications services, "the community has a voice every step of the way," in other words, municipal entry results in "local people mak[ing] local decisions."[28]

Sprint cites (Brief at 19 and 22) an advocacy commentary written by Paul Guppy in support of its erroneous contention that government entry into telecommunications markets

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> entry into the local market is handicapped by the unique circumstance that their success in competing for BOC customers depends upon the BOCs' cooperation. Moreover, BOCs will have access to a mature, vibrant market in the resale of long distance capacity that will facilitate their rapid entry into long distance and, consequently, their provision of bundled long distance and local service. ... New entrants into the local market, on the other hand, do not have available a ready, mature market for the resale of local service or for the purchase of unbundled network elements.

[27] See *Munis Take Broadband Success Stories to Capitol Hill*, Public Power Weekly, No. 40, at 12 (Oct. 6, 2003). Available at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/news/success.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

[28] American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), available at http://www.appanet.org/pdfreq.cfm?PATH_INFO=/legislativeregulatory/broadband/Telecom%20Fact%20Sheet_1-2003.pdf&VARACTION=GO. (URL accessed October 21, 2003.)

fail.[29] In his commentary, Mr. Guppy charges that increased costs for the Click! Network fiber system in Tacoma, Washington resulted in a 50% surcharge in local electric bills. This unsupported claim has been refuted by Click! Network.[30] According to Click!, the surcharge was initiated because of the extraordinary high costs of electricity resulting from the energy crisis impacting California and the Pacific Northwest.[31] At the beginning of the crisis, Click! was already constructed and Tacoma Power had over $100,000 in cash reserves. Because of the unusual conditions resulting from the energy crisis, the $100,000 was not sufficient, and the surcharge was necessary.

Part of the motivation behind the establishment of the Click! Network was that the two telephone companies operating in the utility's service area at that time, were having difficulty were experiencing difficulty keeping up with customer requests for both broadband access and even basic dialtone access. By early 1999, Tacoma Power was providing broadband access to businesses within 15-30 days, while the telephone companies were taking several months to respond to similar requests.[32] Click!'s commercial revenues

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[29] Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, Progress & Freedom Foundation (Feb. 2002).

[30] See Diane Lachel's statement on the Tri-City Broadband website, available at http://www.tricitybroadband.com/failures.htm. (URL accessed October 21, 2003.) Counsel for CFA contacted Diane Lachel, the Government and Community Relations Manager at Click!, to verify the content of her statement, as set forth on the Tri-City's website. Ms. Lachel's statement on the Tri-City website was echoed in *Utility Lines*, a bill insert provided in customers' bills.

[31] *Utility Lines*, Tacoma Power (March/April 2001).

[32] Paul Sommers and Deena Heg, *Spreading the Wealth: Building a Tech Economy in Small and Medium-Sized Regions*, The Brookings Institution Center on Urban and Metropolitan Policy (Oct. 2003). Available at

are covering its operating expenses.[33] Incumbent providers have responded to the new competition by lowering prices and expanding their services. Residents in what was once an underserved market are now paying 10-20% less for expanded channels and services.[34]

Glasgow, Kentucky was an early leader of public sector involvement in communications markets and is an example of the benefits that such involvement can bring to a community. Glasgow's municipal power utility, Electric Plant Board ("EPB"), began offering cable services in 1989 in response to criticisms about the incumbent cable provider. In response to the lower prices offered by EPB, the incumbent lowered its prices.[35] According to Billy Ray, EPB's superintendent, EPB was funded initially by bonds and later by revenues. At no point have EPB's operations been funded by taxes. Today, residents of Glasgow can receive broadband access for one of the lowest rates in the country.[36]

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http://www.brookings.edu/es/urban/publications/200310_Sommers.pdf. (URL accessed October 21, 2003.)

[33] See Ms. Lachel's statement on the Tri-City Broadband website.

[34] American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services*.

[35] Ed Gubbins, *Why You Can Get the Best Deal on High-Speed Access in Glasgow, Kentucky*, Telephony Online (Dec. 9, 2002). Available at http://telephonyonline.com/ar/telecom_why_best_deal. (URL accessed Oct. 21, 2003.)

[36] *Id.*

CONCLUSION

For the foregoing reasons, the Consumer Federation of America respectfully requests this Court to reject the claims of Sprint and U.S. Telecom *et al.* and affirm the decision of the Eighth Circuit.

Respectfully submitted,

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